Federal Court  Cour fédérale

Date: 20180306

Docket: IMM-3299-17

Citation: 2018 FC 254

Toronto, Ontario, March 6, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

HASSAN SAFAJOU

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] Hassan Safajou seeks judicial review of a decision of the Immigration Appeal Division [IAD], which dismissed his appeal of a visa officer's finding of non-compliance with his residency requirement.

[2] For the reasons that follow, Mr. Safajou's application is dismissed.

I. BACKGROUND

[3] Mr. Safajou became a permanent resident of Canada in 2003 under the skilled worker category. At the time, he was single and 40 years old. He had previously sustained injuries in the Iran-Iraq war that included the loss of an eye and ear. After surgery in 2004 in Toronto, Ontario, Mr. Safajou decided to return to recover in Iran, where he deposes that he had physical and emotional support. There, he also had further medical treatment. He was married in Iran in 2008, but his spousal sponsorship application was refused in 2010.

[4] In 2011, Mr. Safajou's daughter was born. He deposes that he was told it would take two years to sponsor his wife and daughter and that he would have to be in Canada during that period to do so. In 2014, Mr. Safajou applied to renew his permanent residency card, which was approved in early 2015. However, the Ankara visa office then made a negative determination with respect to his permanent resident status when he applied for a travel document.

[5] Mr. Safajou appealed this negative determination to the IAD, conceding his failure to comply with the two year residency requirement, having spent only 68 days in Canada during the relevant 5-year period. Rather, Mr. Safajou focused his appeal on humanitarian and compassionate [H&C] grounds. He represented himself, attending by telephone with the assistance of an interpreter. In its decision, the IAD followed the precedent set out in *Arce, Dorothy Chicay Bufee v Minister of Citizenship and Immigration*, 2003 CarswellNat 4878 (WL Can) (Immigration and Refugee Board - Appeal Division), and considered several H&C factors: Mr. Safajou's initial and continuing degree of establishment in Canada; his reasons for

departure from Canada; his reasons for his lengthy and continued stay abroad; his ties to Canada in terms of family; whether he had made reasonable attempts to return to Canada at the first opportunity; the extent of his non-compliance with the residency obligation; and hardship and dislocation that would occur should he lose permanent resident status in Canada. The IAD also considered the best interests of Mr. Safajou's daughter. The IAD concluded that none of these factors weighed in favour of H&C relief and therefore dismissed Mr. Safajou's appeal.

II. ISSUES AND STANDARD OF REVIEW

[6] Mr. Safajou raises two procedural fairness issues in this application: (i) that the IAD was required to tell him that he could call a witness by telephone, and (ii) that the IAD failed to provide him with adequate interpretation. The parties agree, as do I, that these issues are reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[7] Mr. Safajou also raises an issue to be assessed on the reasonableness standard: whether the IAD unreasonably considered the best interests of his daughter in its H&C analysis. On this point, I must be satisfied that the IAD's decision is transparent, justified, and intelligible, and that it falls within a range of reasonable outcomes defensible in fact and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

III. ANALYSIS

[8] I will analyse each of the three issues advanced by Mr. Safajou in the sequence raised with the Court.

A. *Possibility of witness participation by telephone*

[9] Prior to the hearing, Mr. Safajou provided the IAD with a list of four individuals. Three were identified as references, and one as a witness — Dr. Ezat Mossallanejad, a Settlement Counsellor and Policy Analyst at the Canadian Centre for Victims of Torture. Mr. Safajou's disclosure also included a letter from Dr. Mossallanejad, written in 2008, which spoke to Mr. Safajou's medical reasons for returning to Iran and intentions to sponsor his wife.

[10] During the hearing of his appeal, the IAD and Mr. Safajou had the following exchange in respect of Dr. Mossallanejad's participation as a witness:

> **PRESIDING MEMBER:** My last question is that you refer to a witness in a communication that you sent us. Are you referring to yourself or to some other person?
>
> **APPELLANT:** It's another individual whom I send the name and the address.
>
> **PRESIDING MEMBER:** Do you have it, Counsel?
>
> **MINISTER'S COUNSEL:** I don't.
>
> **PRESIDING MEMBER:** No, I don't have the name or address of such a person. It wasn't included in what you sent me. So who are you expecting to be here as a witness today?
>
> **INTERPRETER:** Sorry, it's not loud enough and I'm not getting it. It's, like, it's very unclear. I'm just explaining that I'm not getting —

PRESIDING MEMBER: Yes. I need, first of all, the name of the witness please.

APPELLANT: I send it on page six and his name is Dr. Izat Mozhan Monayjot (ph).

PRESIDING MEMBER: Sorry, page six of your disclosure? So you did. I stand corrected.

APPELLANT: Yes, yes.

PRESIDING MEMBER: I stand corrected. So is this person supposed to be here today?

APPELLANT: No. He said that if necessary I'm ready to witness.

PRESIDING MEMBER: So you haven't made arrangements for him to be present today. Is that right?

APPELLANT: No, I didn't arrange it.

PRESIDING MEMBER: So then I won't be hearing from him. So all I'm hearing from today is you.

APPELLANT: Yes.

[11] Later during the hearing, Mr. Safajou also stated the following:

APPELLANT: I tried to, like, whatever I had undergone I tried to explain it with documents and orally and my family and I are very motivated and very eager to come back to Canada due to my background and also my ties to Canada.

And whatever I said Mr. Izat Mozhan Monayjot (inaudible) —

INTERPRETER: His witness.

APPELLANT: — from Canadian Centre for Victims of Torture he can testify that and he has helped me a lot because of my wounds and the injuries that I have received in the war, and I would like to be given another chance on humanitarian and compassionate grounds so that I would be able to come with my family to Canada and start a new life in Canada.

[12] For the purposes of this judicial review, Mr. Safajou deposes that (i) he did not know that he could contact his witnesses during the IAD hearing, and (ii) that Dr. Mossallanejad had been available to give evidence at the hearing and Mr. Safajou had been "waiting" for the IAD to contact his witnesses.

[13] Mr. Safajou submits that a heightened degree of procedural fairness is owed to unrepresented litigants, relying on *Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 1097 (at para 27). He argues that, while the IAD has control over its choice of procedure, the procedure must allow appellants to "present their case" (*Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at para 15 [*Law*]).

[14] To meet the duty of procedural fairness owed to him, Mr. Safajou argues that the IAD was required to inform him that Dr. Mossallanejad could participate by phone. He further argues that the IAD erred in law by stating that Dr. Mossallanejad could not testify if he was not present at the hearing. Mr. Safajou relies on *Kamtasingh v Canada (Citizenship and Immigration)*, 2010 FC 45 [*Kamtasingh*] and *Kotelenets v Canada (Citizenship and Immigration)*, 2015 FC 209 at para 32 [*Kotelenets*].

[15] In the circumstances of this case, I do not agree that the IAD breached the duty of fairness owed to Mr. Safajou in respect of his potential witness. It is evident from the transcript (excerpted above) that the IAD gave Mr. Safajou the opportunity to call his witness: he was asked whether he had made arrangements for Dr. Mossallanejad to give evidence at the hearing, and he responded in the negative. Notwithstanding the position Mr. Safajou now takes on this

application, Mr. Safajou communicated to the IAD that he had made no arrangements for Dr. Mossallanejad to be available at the hearing. Indeed, Mr. Safajou only stated that Dr. Mossallanejad could be a witness "if necessary".

[16] *Kamtasingh* and *Kotelenets* are both distinguishable because they involved witnesses who were present and available to give evidence. In those cases, the IAD was found to have breached procedural fairness by discouraging and excluding witnesses, respectively. Rather, Mr. Safajous's case is more similar to the facts in *Yari v Canada (Citizenship and Immigration)*, 2016 FC 652 [*Yari*] — there, the applicant argued on judicial review that the IAD ought to have adjourned the hearing in part because he did not understand he could have called witnesses. This Court held that the IAD was not required to offer an adjournment where the applicant had only "named a possible witness during the hearing, without any indication what the witness would offer and who was not present" (*Yari* at para 43).

[17] The Court also held in *Yari* that the applicant had had enough information and time to inform himself about the IAD appeal process (at para 44). Similarly, in this case, Mr. Safajou received a Notice to Appear prior to the hearing, which directed him to the *Immigration Appeal Division Rules*, SOR/2002-230. In particular, Rule 37 sets out what an appellant must provide if he or she wishes to call a witness.

[18] I do not agree with Mr. Safajou's argument that the IAD erred in law when it stated that it would "not be hearing from" from Dr. Mossallanejad because Mr. Safajou had not "made arrangements for him to be present", or that this amounted to effectively excluding witness

testimony. Just because Mr. Safajou was self-represented and now deposes that he did not understand all the IAD's procedures does not mean that the IAD was required to specifically advise him that witnesses could give evidence by telephone — especially when Mr. Safajou did not indicate the potential witness' availability at the time of the hearing.

[19] Further, the IAD made it clear that it was Mr. Safajou's burden to prove his own case:

> **PRESIDING MEMBER:** Finally you have the burden of proof today to persuade me that there are in fact sufficient humanitarian considerations at play to justify the decision that you are seeking. In other words —
>
> **APPELLANT:** Yes.
>
> **PRESIDING MEMBER:** In other words it's up to you to make your case. You understand that burden?
>
> **APPELLANT:** Yes.

[20] While the IAD indeed owes a heightened duty of procedural fairness to self-represented appellants, it is not required to act as counsel (*Singh v Canada (Citizenship and Immigration)*, 2015 FC 1055 at para 19 [*Singh*]), and Mr. Safajou must accept the consequences of self-representation (*Singh* at para 19; *Tong v Canada (Citizenship and Immigration)*, 2018 FC 6 at para 21 [*Tong*]). In other words, being self-represented does not shift the onus from the appellant to the IAD.

[21] In sum, I am satisfied that Mr. Safajou was given sufficient opportunity to present his story (*Law* at para 15; *Tong* at para 21). It was his responsibility to arrange for Dr. Mossallanejad's participation, and he did not do so.

B. *Translation during the IAD hearing*

[22] Mr. Safajou next argues that the IAD unfairly prevented the interpreter from interpreting the Respondent's counsel's submissions during the hearing. He submits that he was entitled to know everything that transpired at his hearing so that he could fully understand and respond to the case against him, and that he had a right to "continuous, precise, competent, impartial and contemporaneous translation" relying on *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 [*Mohammadian*] and *Nekoie v Canada (Citizenship and Immigration)*, 2012 FC 363.

[23] However, Mr. Safajou has not provided any affidavit evidence for the purposes of this application setting out what occurred from his perspective or whether there was any portion of the hearing he did not understand. I agree with the Respondent that it is not obvious from the transcript that any portion of the hearing was indeed not translated, as Mr. Safajou argues.

[24] However, what is clear from the transcript, which is all that is before the Court (there being no recording of the hearing in the record), is that Mr. Safajou did not speak up during the Respondent's counsel's submissions or indicate in any way that a portion of the hearing was not being translated to him. Although Mr. Safajou is entirely correct that an appellant has a right to adequate interpretation, that right can be waived if the appellant does not object to inadequate interpretation at the first reasonable opportunity (*Tong* at para 18; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 at para 3, summarizing *Mohammadian*). This Court recently revisited that principle in *Noori v Canada (Citizenship and Immigration)*, 2017 FC 1095 [*Noori*]:

> [26] … the Principal Applicant expressly confirmed to the Officer at the beginning of the interview that he understood the interpreter. After the Officer provided instructions as to how the interview would proceed, he again confirmed that he understood these instructions and fully understood the interpreter. The Principal Applicant now asserts that there were issues with the quality of the interpretation and raises an additional concern impugning the objectivity of the interpreter. However, the Principal Applicant did not raise these concerns during the hearing. In his written submissions, he argues that he could not do so due to language barriers and feeling overwhelmed by the interpreter's change in body language when he referred to the Taliban's treatment of Hazara and Shia people. In my view, if the Principal Applicant had such concerns during the interview, it was reasonable for him to raise them at that time. As explained in *Mohammadian*, the claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known during the course of the hearing, unless there are exceptional circumstances for not doing so. The Applicants' arguments do not support a conclusion that there were exceptional circumstances surrounding this interview which would justify a departure from this principle.

[25] Here, as in *Noori*, Mr. Safajou confirmed during the IAD hearing that he understood the interpreter and has provided no "exceptional circumstances" for why he did not raise his translation concerns at the time they allegedly arose, which would have been reasonable under the circumstances. Indeed, while the situation here differs slightly from *Noori* in that Mr. Safajou alleges that part of the hearing was not translated at all — rather than inaccurate or poor translation — his onus to object in such circumstances would naturally be elevated: it would have been obvious to Mr. Safajou that although translation had occurred prior to that point in the hearing, the interpreter was suddenly silent and no longer translating. I therefore do not agree with Mr. Safajou that there was a breach of procedural fairness arising from translation issues, if indeed any occurred.

C. *Best interests of the child*

[26] Mr. Safajou argues that the IAD was not alert, alive, and sensitive to his daughter's best interests, and that it failed to conduct a serious, nuanced assessment of the impact of the loss of Mr. Safajou's permanent residence status on his daughter. He submits that the IAD misstated his daughter's age, did not ask about his daughter's situation in Iran, failed to mention Mr. Safajou's sponsorship efforts, and did not deal with Mr. Safajou's submissions regarding how it would be in his daughter's best interests to grow up in Canada. In support of his position, Mr. Safajou relies on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC) and *Ferrer v Canada (Citizenship and Immigration)*, 2009 FC 356.

[27] In light of the relevant principles as set out in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], I do not accept Mr. Safajou's arguments. Although the IAD misstated Mr. Safajou's daughter's age, this error was minor — it stated that she was "approaching seven", when she was really approaching six. Further, the IAD specifically considered Mr. Safajou's submission that he would sponsor his wife and child if his appeal were allowed. However, the IAD found that there was no evidence that he had the means or support mechanisms in place to resume permanent residence in Canada away from his wife and child, and noted that these issues had prompted Mr. Safajou's return to Iran in the past. The IAD considered that Mr. Safajou's daughter was attending school in Iran, and concluded that it would be in her best interests to remain with her family there, where Mr. Safajou had chosen to pursue his life. In my view, this analysis sufficiently identified, defined, and examined Mr. Safajou's daughter's interests in light of the evidence (*Kanthasamy* at para 39).

[28] The burden was on Mr. Safajou to put forward meaningful evidence in support of his daughter's best interests (*Fouda v Canada (Immigration, Refugees and Citizenship),* 2017 FC 1176 at paras 35 and 42). In this case, the IAD's analysis of the daughter's best interests was reasonable in light of the extent of the evidence submitted (see *Tong* at para 32), including with respect to the family's life in Iran and Mr. Safajou's uncertain prospects in Canada. I neither find this, nor any of the other H&C findings made by the IAD, to be unreasonable.

IV. CONCLUSION

[29] I commend Mr. Safajou's counsel for her able advocacy — however, in the end, I have not been persuaded that the IAD breached Mr. Safajou's rights to procedural fairness or that it conducted an unreasonable best interests of the child analysis.

[30] Accordingly, this application is dismissed.

[31] Neither party raised a question for certification — I agree that no question arises.

JUDGMENT in IMM-3299-17

THIS COURT'S JUDGMENT is that the application is dismissed. No questions for certification were argued and none arise.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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